

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA FAHRINGER)	
Claimant)	
VS.)	
)	Docket Nos. 159,418 & 159,419
IBP, INC.)	
Respondent)	
Self-Insured)	

ORDER

Respondent and claimant both ask for review of issues decided by Special Administrative Law Judge William F. Morrissey in an Award entered on October 22, 1996. The Appeals Board heard oral argument on April 17, 1997. Board Member Gary Korte recused himself from this case, and Mr. Jeff Cooper acted in his place as a Board Member Pro Tem.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared on behalf of the claimant. Tina Sabag of Dakota City, Nebraska, appeared on behalf of the respondent, a self-insured.

RECORD AND STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Award and has reviewed and considered the record listed in the Award.

ISSUES

Claimant alleges she has both Raynaud's syndrome and fibromyalgia and that both were caused by work activities performed in the course of her employment with respondent, IBP, Inc. The Special Administrative Law Judge found that claimant failed to prove that either condition arose out of her employment. Claimant asks the Appeals Board to find she suffered permanent compensable injuries. If the Appeals Board determines the claims to

be compensable, claimant also asks the Board to determine: (1) whether claimant suffered two accidents, (2) the nature and extent of claimant's disability, (3) whether claimant is entitled to temporary total disability for six weeks following her last day of work, and (4) whether claimant is entitled to future medical expenses.

Respondent asks the Appeals Board to affirm the decision by the Special Administrative Law Judge regarding compensability. Although the Special Administrative Law Judge found the claim was not compensable, he also made findings on average weekly wage and entitlement to temporary total disability. If the claim is found to be compensable, respondent asks for modification of the finding relating to average weekly wage. Respondent also asks that the costs of the deposition of Philip R. Mills, M.D., be assessed against claimant's counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes as follows:

- (1) Whether claimant's injuries arose out of and in the course of her employment.

As above indicated, claimant asserts that her work caused or aggravated both Raynaud's syndrome and fibromyalgia. For the reasons stated below, the Appeals Board concludes that claimant has established by a preponderance of the credible evidence that her Raynaud's syndrome was aggravated by her work but has not established that the fibromyalgia was either caused or aggravated by her employment.

Claimant worked for respondent from July 24, 1989, through March 13, 1990. She worked most of this time as a bagger but also worked as a scale operator and a pastrami and brisket trimmer. The bagging work involved continuous use of her hands with weights from a couple of ounces up to 60 pounds. The pastrami and brisket trimming work involved working with a hook and knife. Claimant also worked two light-duty jobs, the trash detail and picking meat out of the bone belt.

Claimant began having problems with her wrists a few months after she started working. The plant doctor placed her on a medical management program to monitor her complaints. On March 12, 1990, a loin fell on claimant, injuring her left arm. She was examined and treated at the hospital emergency room. Her arm was placed in a sling and she was returned to light-duty work. On March 13 claimant quit her job at IBP.

There appears to be little, if any, dispute that claimant has both Raynaud's syndrome and fibromyalgia. The dispute concerns the cause of those conditions and whether either was caused, aggravated, or accelerated by the work claimant performed for respondent. As indicated, the Appeals Board finds the Raynaud's syndrome is compensable but not the fibromyalgia. The Board bases these conclusions on the history of the development of each condition and the medical opinions as to causation.

Claimant first experienced and was treated for symptoms in her hands during the course of her employment. The symptoms included swelling in the hands, one of the primary symptoms of Raynaud's. In contrast, it does not appear the fibromyalgia symptoms began until several years after claimant's employment for respondent. During her employment, claimant experienced upper extremity symptoms which could have been early fibromyalgia symptoms. However, the fibromyalgia manifested primarily in the neck and shoulders. At the January 28, 1992, preliminary hearing, more than 1 ½ years after leaving employment for respondent, claimant complained only of problems with her wrists, hands, and left arm. In February of 1992 she complained to her then treating physician, Dr. Delgado, problems only in her wrists, hands, and forearms. In March 1993, Dr. Welch specifically evaluated claimant for fibromyalgia but concluded that claimant's condition did not meet the criteria for this diagnosis. Dr. Welch saw claimant repeatedly thereafter. Dr. Welch did not diagnose fibromyalgia until September 29, 1993, approximately 3 ½ years after claimant last worked for IBP.

Dr. Delgado first saw claimant on February 11, 1992. He examined claimant at respondent's request. He initially diagnosed tendonitis in both arms. He referred claimant for physical therapy and reconditioning. Dr. Delgado saw claimant again on March 3, 1992. At that time her symptoms had improved. Although he tested for it, he found no evidence of carpal tunnel syndrome. Dr. Delgado saw claimant for the last time on July 8, 1992, and he recommended vascular and neurological studies. His final diagnosis was possible Raynaud's phenomenon. He found no indication of fibromyalgia.

As respondent emphasizes, Dr. Delgado testified claimant's Raynaud's syndrome was not caused by work-related activities. He also lists several factors, other than the work, which might aggravate the condition. Dr. Delgado acknowledges, on the other hand, that working in a cold environment, using a hook and knife, and repetitive pulling and pushing of meat pieces could aggravate Raynaud's syndrome. In response to a hypothetical question which asked Dr. Delgado to assume claimant could do certain activities prior to employment without symptoms and then experienced the onset of those symptoms during employment, he agreed that it would be reasonable to assume the repetitive work activities were a significant factor in her symptoms. The hypothetical question did, in our view, accurately stated the history of claimant's Raynaud's condition. Dr. Delgado does not indicate whether the work activities would or would not permanently aggravate the Raynaud's syndrome.

Dr. Kathryn Welch also testified. She first saw claimant on March 12, 1993, by referral from Dr. Tawadros. At that time claimant complained of swelling in her hands and pain across her shoulders. Dr. Welch initially evaluated claimant for fibromyalgia but found there were not enough trigger points to make the diagnosis. Dr. Welch continued to treat claimant and saw her repeatedly in 1993 and also in 1994. She diagnosed the fibromyalgia in September of 1993. Dr. Welch agrees that claimant's work activities did not cause the Raynaud's syndrome. She testifies that the cold could have triggered but not caused it. She also acknowledges that there can be a variety of factors which aggravate Raynaud's. These include smoking and stress, but also include repetitive use of hands.

Dr. Welch did not believe claimant had fibromyalgia until several years after leaving employment with respondent. Dr. Welch opines the fibromyalgia is associated with the Raynaud's. She states it is not a cause and effect relationship. It is an association. In the Board's view, this latter opinion does not establish that the Raynaud's, which we do consider compensable, caused or aggravated or accelerated the fibromyalgia.

Philip R. Mills, M.D., also evaluated claimant at the request of respondent. He diagnosed both Raynaud's and fibromyalgia. He did not have an opinion as to whether the Raynaud's was caused by her work with respondent. He stated that exposure to cold generally does not cause permanent aggravation of Raynaud's. It may cause a temporary exacerbation. His diagnosis of Raynaud's was based upon claimant's history. At the time he examined her, there were no findings from which he would have diagnosed Raynaud's. He also testified that he could not say whether the work caused the fibromyalgia.

Finally, P. Brent Koprivica, M.D., testified that he examined the claimant at the request of claimant's counsel on February 13, 1995. He also diagnosed both Raynaud's and fibromyalgia. In his opinion both the Raynaud's and fibromyalgia were aggravated by claimant's work. He states, however, that his opinion regarding the causation of fibromyalgia assumes a history of symptoms beginning when she was working for respondent and continuing. This history is not, in our opinion, consistent with the other evidence in the record. In our view, his diagnosis and opinion regarding causation of Raynaud's appear to be based upon an accurate history but his opinion regarding the cause of fibromyalgia is not.

In summary, our review of the medical testimony suggests that both Drs. Welch and Delgado, treating physicians, agree that the type of activities claimant performed for respondent could aggravate Raynaud's. They do not expressly state that such an aggravation would be permanent. Both also agree that the fibromyalgia was not caused or aggravated by claimant's work. Dr. Mills indicates he cannot give an opinion as to causation of either the Raynaud's or fibromyalgia. Dr. Koprivica attributes both Raynaud's and fibromyalgia to claimant's work but steps back from his opinion as to causation of fibromyalgia based upon a more accurate history.

Based upon these medical opinions, the history confirmed by the medical records at IBP, and the consistent complaints thereafter, the Board concludes that the Raynaud's was aggravated by claimant's work. Aggravation of a pre-existing condition is a compensable injury. Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984). The Appeals Board finds the fibromyalgia was neither caused nor aggravated by claimant's work and is not compensable.

Several doctors gave opinions as to functional impairment resulting from the Raynaud's alone. Dr. Delgado testified that he would rate claimant's impairment as a 19 percent impairment to the body as a whole. This was for Raynaud's syndrome only. Dr. Mills rated the Raynaud's syndrome a 6 percent impairment to the body as a whole. Dr. Koprivica rated claimant's total impairment as 25 percent to the body as a whole. When he eliminates preexisting impairment and possible subsequent aggravation by nonwork

factors, he concludes that claimant has a 16 percent impairment to the body as a whole attributable to aggravation of claimant's work. Twelve percent of this he attributes to Raynaud's syndrome and four percent to fibromyalgia. Taking into consideration these various conflicting medical opinions, the Appeals Board concludes that claimant sustained a 12 percent permanent partial general body disability attributable to the aggravation of Raynaud's syndrome from claimant's work for respondent. The Appeals Board also concludes that claimant has failed to sustain her burden of proving that the fibromyalgia was caused or aggravated or accelerated by claimant's work.

Claimant asked the Board to award work disability. Both parties offered expert testimony regarding the extent of work disability. Respondent argues claimant is not entitled to work disability because she quit her employment with respondent. The Appeals Board agrees claimant did not leave employment because of the Raynaud's syndrome. She left because she was generally dissatisfied with her treatment and the working conditions. In addition, claimant earned a comparable wage post injury while working for a nursing home and then while working for the State Board of Education. She left the last post at the State Board of Education because a grant ended. Finally, although several physicians testify to restrictions necessitated by the Raynaud's, the vocational experts, Mr. Gammon and Mr. Langston, do not give opinions of work disability for the Raynaud's only. The Board, therefore, concludes claimant is entitled to benefits for a 12 percent disability based on functional impairment.

(2) Temporary total disability.

Claimant has requested temporary total disability benefits from the period March 13, 1990, through April 24, 1990. The Appeals Board has concluded that claimant is not entitled to those benefits for two reasons. First, the Appeals Board concludes that claimant did not leave her employment because of her work-related Raynaud's syndrome. The records reflect that she left primarily due to her dissatisfaction with working conditions at IBP. The physical problems she was having with her hands may have been a factor, but nothing in the record suggests those rendered her unable to continue her work. In addition, the record reflects that claimant went to work at a nursing home within a week or two after she left her employment at IBP. Although she remained at this nursing home only a short period of time, she thereafter took employment with the State Board of Education. Claimant has not met her burden of establishing that she was temporarily totally disabled during the period March 13, 1990, to April 24, 1990.

(3) Average weekly wage.

Claimant asserts that she is entitled to an average weekly wage based upon Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). From our review of the record, the average weekly wage should be based upon a five-day work week, not six. The Special Administrative Law Judge found an average weekly wage of \$388.34 using a six-day work week. The evidence indicates that claimant regularly worked a five-day work week. She was expected to be available for work on Saturdays and was notified whether she would work on Saturday. However, in our view, the principles applied

in Tovar do not apply here. Claimant was not on call on Saturdays. She generally did not work Saturdays.

Claimant's average weekly wage should be computed in accordance with K.S.A. 44-511 based on a five-day work week. The record establishes an average gross weekly wage of \$329.49, this consists of \$266.80 straight pay, an average weekly overtime of \$21.97, and fringe benefits of \$40.72.

(4) Future medical.

Dr. Welch testified that Raynaud's syndrome is a condition which may require ongoing medical treatment. Neither Dr. Welch nor any of the other physicians testify to a current need. The Appeals Board concludes that claimant should be entitled to future medical expenses upon proper application to and approval by the Director.

(5) Entitlement to unauthorized medical expenses for two accidents.

Claimant asserts that she is entitled to unauthorized medical expense allowance for two separate accidents. The Appeals Board agrees the record does establish two accidents. The first is a repetitive aggravation of claimant's Raynaud's syndrome. The second was a single traumatic event occurring on March 12, 1990, when the loin fell on her shoulder. The first, the Board has found resulted in a permanent injury. For the second, claimant was treated. It was a temporary injury only. However, both entitle claimant to an allowance of up to \$350 in unauthorized medical expense. The record does not reflect the precise amount of unauthorized expenses incurred for each accident. Claimant asserts an entitlement to some unauthorized medical expense for evaluation of both. The Appeals Board finds claimant is entitled to up to \$350 in unauthorized medical expense for each injury upon proper presentation to respondent of medical bills for treatment or evaluation of those injuries.

(6) Cost of Dr. Mills' deposition.

The Special Administrative Law Judge assessed costs of all depositions against respondent. Respondent argues the costs of Dr. Mills' deposition should be assessed against claimant because claimant's counsel unnecessarily prolonged the deposition with irrelevant questions. The Appeals Board finds no reason to reverse the award of costs and affirms same.

AWARD

WHEREFORE, the Appeals Board finds that the Award of Special Administrative Law Judge William F. Morrissey, dated October 22, 1996, should be, and is hereby, affirmed in part and reversed in part.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Brenda

Fahringer, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred from July 24, 1989 through March 13, 1990, and based upon an average weekly wage of \$329.49 for 30.86 weeks of temporary total disability compensation at the rate of \$219.67 per week or \$6,779.02, followed by 384.14 weeks at the rate of \$26.36 per week or \$10,125.93, for a 12% permanent partial general disability, making a total award of \$16,904.95.

As of May 30, 1997, there is due and owing claimant 30.86 weeks of temporary total disability compensation at the rate of \$219.67 per week or \$6,779.02, followed by 345.57 weeks of permanent partial compensation at the rate of \$26.36 per week in the sum of \$9,109.23 for a total of \$15,888.25, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$1,016.70 is to be paid for 38.57 weeks at the rate of \$26.36 per week, until fully paid or further order of the Director.

Claimant is awarded future medical expenses upon proper application to and approval by the Director.

Claimant is entitled to up to \$700 in unauthorized medical expenses as stated in section (5) of this Order.

The Appeals Board approves and adopts the orders by the Special Administrative Law Judge relating to attorneys fees and other fees and expenses.

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: John J. Bryan, Topeka, KS
- Tina Sabag, Dakota City, NE
- William F. Morrissey, Special Administrative Law Judge
- Floyd V. Palmer, Administrative Law Judge
- Philip S. Harness, Director